83452-1
NO. 36350-0

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KRISTINA GRIER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Rosanne Buckner

No. 06-1-00897-1

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE.

1. Procedure

On November 9, 2006, Kristina Ranae Grier, hereinafter "defendant," was charged by corrected amended information with murder in the second degree for the death of Gregory Scott Owen. CP 6-7. The State also alleged a firearm sentencing enhancement. *Id.* On March 23, 2007, both parties appeared for a CrR 3.5 and CrR 3.6 hearing. RP[1] (3/23/07) 5. On April 11, 2007, both parties appeared for trial. RP

[1] There are a total of 12 volumes of verbatim report of proceedings below. Nine of the volumes are consecutively numbered. For convenience of reference, the State will reference the date of the proceeding followed by the page number.

(4/11/07) 111. On May 1, 2007, the defendant was convicted of murder in the second degree. CP 120. The jury found that the defendant was not armed with a firearm at the time of the offense. CP 121.

On May 25, 2007, the defendant was sentenced to 220 months in custody. CP 136-146. On the same day, the defendant filed a timely notice of appeal. CP 159-170. The State filed a notice of cross-appeal on May 29, 2007[2]. CP 205-206.

2. Facts

On February 21, 2006, the defendant was at home in the morning, and then was at the casino. RP (4/11/07) RP 124, 126-127. When the defendant returned to the house, she indicated that the victim, Gregory Owen wanted to hang out at the house. RP (4/11/07) 127-128. The victim's fiancée, Michelle Starr, and their daughter went to the defendant's home with the victim. RP (4/11/07) 215-217. The defendant's son, Nathan, knew the victim, and the defendant had met the victim through Nathan. RP (4/11/07) 124, 128. Cynthia Michaels, Nathan's girlfriend, was also present. RP (4/12/07) 418-419. On the night of the murder, everyone was drinking. RP (4/11/07) 182. The victim and the defendant were both intoxicated. RP (4/11/07) 139, 142, 147, 182.

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[2] The State is seeking to dismiss its cross-appeal. A separate motion seeking to dismiss the cross-appeal is being simultaneously filed with the State's response brief.

The defendant became upset that some cheese that had been left in the kitchen was missing. RP (4/11/07) 132-133. The defendant went to her room and began crying. RP (4/11/07) 133. Nathan testified that he did not want to make a scene because there were people there, including the victim's child. *Id.* The victim went to talk to the defendant in an effort to calm her. RP (4/11/07) 134.

The defendant owned several guns. RP (4/11/07) 135. She owned a couple of .9 millimeter handguns. *Id.* She also had a Winchester 12-gauge shotgun and a .22 caliber rifle. RP (4/11/07) 136. The defendant would occasionally take her pistols to a shooting range. *Id.* The defendant was upset with Nathan because he had lost a clip to one of her guns. RP (4/11/07) 135, 217-218. The defendant had $100 that belonged to Nathan that she gave him once he found the clip. RP (4/11/07) 135.

It was then agreed that Starr would drive the defendant to the liquor store to purchase alcohol. RP (4/11/07) 218. Starr asked the defendant to leave the guns she kept in her purse behind. RP (4/11/07) 219. When they were driving to the second liquor store, Starr saw the guns in the defendant's purse. *Id.*

When Starr and the defendant arrived back at the house, the defendant poured herself a drink and went into the bedroom. RP (4/11/07) 222. She eventually came out of the bedroom and everyone started drinking. RP (4/11/07) 225. The defendant complained about Nathan's girlfriend, Cynthia Michaels. RP (4/11/07) 226, (4/12/07) 418-419, 431.

The defendant began accusing Nathan of not being a good son. RP (4/11/07) 141. Starr heard the defendant insulting Nathan. RP (4/11/07) 227-228. Nathan told the defendant to shut up, and, according to Nathan, the victim slapped him. RP (4/11/07) 141.

At one point during the evening, Starr suggested that they take the guns from the defendant. RP (4/12/07) 444. The defendant was waving the guns at Nathan and told him that she could shoot him if she wanted to. *Id.*

The defendant began flirting with the victim, which angered Starr. RP (4/11/07) 142-143. Nathan told the defendant that she had to go to bed because she was wobbling around. RP (4/11/07) 144. Starr stated that she was scared because the defendant owned guns and was scared she was going to start waving them around. *Id.* Starr told Nathan that he should try to get the guns away from the defendant for the night. RP (4/11/07) 145. The defendant had the guns with her and always checked for them. RP (4/11/07) 146.

Nathan believed that both of the defendant's handguns were in her purse. RP (4/11/07) 146. When the defendant was looking away, the victim took the defendant's purse. RP (4/11/07) 147. Nathan then carried the defendant to her room. RP (4/11/07) 147. The victim began unloading all of the clips that went with the guns. RP (4/11/07) 148. The victim had one of the defendant's handguns. RP (4/11/07) 149. Nathan told the victim that he could not keep the gun because the defendant would

call the police. RP (4/11/07) 149-150. Nathan testified that the victim became upset and put the barrel of the gun in Nathan's mouth and told him that the gun was his. RP (4/11/07) 150-151. Nathan told the victim that he had to leave because when the defendant woke up she was going to mad that her gun was missing. RP (4/11/07) 151. Starr testified that the victim was actually buying the gun, and was going to bring money for the gun the next day. RP (4/11/07) 236-237. Starr indicated that the victim put the gun in his car. RP (4/11/07) 238.

The victim and Nathan started putting the victim's things into the victim's car. RP (4/11/07) 151. When the victim and Nathan were outside, the victim fired a shot from the gun at a neighbor's house. RP (4/11/07) 152, (4/12/07) 289-290. After the victim fired a shot, Nathan heard the defendant asking if they had her gun. RP (4/11/07) 153. Nathan tried to tell the defendant that the sound she heard was a bottle rocket, but the defendant told him that she knew the sound of her gun. *Id.* The victim also tried to calm the defendant by telling her that the sound was fireworks. *Id.*

The victim later punched Nathan in the face after Nathan refused to provide him the telephone number of a mutual acquaintance. RP (4/11/07) 155-156, 241. The defendant came out of her room and stated that her gun was gone. RP (4/11/07) 157. She stated that she had put it in her purse. *Id.* The defendant also told the victim to get off of Nathan. RP

(4/11/07) 158-159. The defendant told the victim and Starr to leave. RP (4/11/07) 158.

Starr, the victim, and their daughter were at their car. RP (4/11/07) 243-244. The defendant armed herself with a shotgun, which she checked to make sure was loaded, and went to the victim's car. RP (4/11/07) 160, 244, (4/12/07) 453. The defendant cocked the shotgun and pointed it at the victim and Starr. RP (4/11/07) 244-245, (4/12/07) 287, 453. The victim ultimately disarmed the defendant after Starr struggled with her and hit her head on the ground several times. RP (4/11/07) 246. Nathan called the police from his room. RP (4/11/07) 160. The victim put the shotgun in his car. RP (4/11/07) 247.

The defendant returned to the house and told Nathan that the victim took her guns. RP (4/11/07) 162. The victim and Starr could not find the keys to their car, so the victim went back into the house to look for the keys. RP (4/11/07) 248. Nathan indicated that the victim was upset that the defendant had gone out to them with a shotgun. RP (4/11/07) 164. At the time the victim went to the house to look for the keys, he was unarmed. RP (4/11/07) 249.

The victim and the defendant got into an altercation. RP (4/11/07) 165. Nathan heard a bang and ran out of the house. RP (4/11/07) 167. Nathan stated that the defendant was trying to protect him. *Id.* Nathan originally told police that the victim had a gun at the time, and was trying

to protect the defendant, but then learned that Washington had the defense of self defense. RP (4/11/07) 173.

Starr heard the gunshot, and ran to the front door. RP (4/11/07) 249. Michaels saw blood behind the victim on the wall and saw the defendant pulling on the victim's jacket. RP (4/12/07) 457-458. Starr saw the victim lying on the ground and the defendant above him, pulling on his jacket and calling him names. RP (4/11/07) 249. The victim grabbed his chest and started to exit the house. RP 250-251. Starr followed the victim to leave the house. RP (4/11/07) 252. The defendant said "get her," and started to come after Starr. *Id.* Starr had to kick the defendant to stop her from getting in Starr's car. RP (4/11/07) 252-253. Michaels intervened and struggled with the defendant to keep her from Starr. RP (4/11/07) 253, (4-12/07) 460. Michaels saw the defendant and Starr wrestling, and Michaels pulled the defendant off of Starr. RP (4/12/07) 460. The defendant called Michaels a bitch and told her that she would kill her. RP (4/12/07) 461. Michaels went into the house and closed the door. RP (4/12/07) 463. The defendant entered the house through the front window. RP (4/12/07) 463. Michaels left out the back door of the house. RP (4/12/07) 464.

Lakewood Police Sergeant Kolp responded to the scene at 11:38 p.m. RP (4/12/07) 297, 300-301. Sergeant Kolp was the tactical commander for the SWAT team. RP (4/12/07) 297. Sergeant Kolp learned that there had been a confirmed shooting, and that the suspect was

still in the house. RP (4/12/07) 308. The police stayed outside of the house for almost four hours, directing the occupants of the house to come out. RP (4/12/07) 313-315. The suspect, identified as the defendant, ultimately surrendered. RP (4/12/07) 348, 357, 371.

Officer Vahle also responded to the scene. RP (4/12/07) 360. Officer Vahle contacted people who were being detained by other officers. RP (4/12/07) 364. One of the persons contacted stated that the male subject's mother had shot a male at the house. RP (4/12/07) 367. Officer Vahle made contact with the defendant once she was transported to a hospital. RP (4/12/07) 373. Officer Vahle detected an obvious odor of alcohol coming from the defendant. RP (4/12/07) 375. Her speech was consistent with someone who was intoxicated. RP (4/12/07) 375.

Dr. Adam Fox examined the defendant in the morning hours of February 22, 2006. RP (4/18/07) 11. Dr. Fox requested that the defendant's blood alcohol level be tested, and it was determined to be .16. RP (4/18/07) 12-13.

Brian Johnson, a detective and lead of the forensic services department for the city of Lakewood, was dispatched to the scene. RP (4/16/07) 490, 494. He recovered a semiautomatic pistol from the victim's vehicle. RP (4/16/07) 518-519. There were no rounds in the chamber. RP (4/16/07) 520. Detective Michael Zaro also responded to the scene. RP (4/16/07) 585-586. Detective Zaro executed a search warrant on the defendant's residence. RP (4/16/07) 588. He observed a

large pool of blood in the hallway of the residence. RP (4/16/07) 590. There was also blood drops on the floor, leading out of the front door. RP (4/16/07) 590. Detective Zaro searched the residence for the murder weapon, but was unable to recover it. RP (4/16/07) 593. Detective Zaro did, however, learn that the wound to the victim had gone through his body and that a bullet was likely in the residence. RP (4/16/07) 594. He was able to locate the bullet. RP (4/16/07) 596.

Terry Franklin, a forensic specialist for the Washington State Patrol Crime Laboratory, examined the bullet that was believed to have killed the victim, and determined that it came from a Hi-Point firearm. RP (4/17/07) 683, 705. Detective Zaro had information that the pistol used to shoot the victim was a black semi-automatic pistol, possibly a Hi-Point. RP (4/16/07) 602. A Hi-Point firearm box was located in the defendant's bedroom. RP (4/17/07) 633, 651.

A bloody footprint was left near the victim's body, indicating that someone had walked through the victim's blood. RP (4/16/07) 562, 633. A pair of shoes were found in the defendant's bedroom that were "not dissimilar" to the pattern of the bloody footprint. RP (4/16/07) 564, 591. Jeremy Sanderson, a forensic scientist, examined the boots and determined that the blood on the boots matched the victim's DNA. RP (4/17/07) 726, 737-738. A pair of pants were also recovered from the defendant's bedroom had blood on them that matched the victim's DNA. RP (4/16/07) 592, (4/17/07) 738.

Dr. Robert Ramoso, the medical examiner for Pierce County, performed the autopsy on the victim. RP (4/17/07) 669-670. He determined that the cause of death was a gunshot wound to the chest of the victim. RP (4/17/07) 670. He was also able to determine that the shot occurred within 18 inches of the victim. RP (4/17/07) 677. Dr. Ramoso testified that the victim had a blood alcohol level of .16 in his system, and that he also had ingested marijuana. RP (4/17/07) 680.

C. ARGUMENT.

1. THIS COURT SHOULD REMAND FOR THE TRIAL COURT TO CONDUCT A COMPETENCY HEARING AND FOR ADDITIONAL TESTIMONY TO BE TAKEN AS TO WHY THE ORIGINAL ORDER FOR A COMPETENCY EVALUATION WAS VACATED.

A trial court is vested with broad discretion in determining whether a competency examination should be ordered. ***State v. Osborne***, 102 Wn.2d 87, 98, 684 P.2d 683 (1984). A motion to determine competency must be supported by facts and will not be granted merely because it was filed. ***State v. Lord***, 117 Wn.2d 829, 901, 822 P.2d 177 (1991). The facts that a trial judge may consider in determining whether or not to order a formal inquiry into the competence of an accused include the defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel. ***In re Fleming***, 142 Wn.2d 853, 863, 16 P.3d 610 (2001). If the trial court

is not provided with sufficient information regarding the defendant's competency, or there is no reason for the trial judge to doubt the defendant's competency, the court does not abuse its discretion by declining to order a mental examination and convene a hearing. *Id.* at 863-864.

The trial court's determination of competence to stand trial is a matter within its discretion, reversible only upon a showing of abuse of that discretion. ***State v. Benn***, 120 Wn.2d 631, 662, 845 P.2d 289, *cert. denied*, 510 U.S. 944, 114 S. Ct. 3825, 126 L. Ed. 2d 331 (1993). Deference is given to the trial court's determination because of the court's opportunity to observe the defendant's behavior and demeanor. ***State v. Hicks***, 41 Wn. App. 303, 305, 704 P.2d 1206 (1985). The court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. ***State ex rel. Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

RCW 10.77.050 provides that "[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." A criminal defendant is not competent to be tried if he or she is incapable of properly appreciating the nature of the charges and their consequences, and of rationally assisting in the defense. ***State v. Marshall***, 144 Wn.2d 266, 278, 27 P.3d 192 (2001). The issue of a criminal defendant's competency is a mixed question of law and fact. *Id.* at 281.

RCW 10.77.060(1)(a) mandates that the trial court convene a hearing to determine the defendant's competency to stand trial whenever "there is reason to doubt his or her competency." The court is further required to appoint mental health experts to evaluate the defendant when such circumstances exist. RCW 10.77.060(1)(a). Failure to comply with procedures designed to ensure that only competent defendants are tried and convicted is a violation of due process. ***In re Fleming***, 142 Wn.2d 853, 863, 16 P.3d 610 (2001).

In this case, the State requested that the defendant receive a competency evaluation. CP 188-191; RP (6/26/06) 3. The State's basis for the request was that the defendant had written letters to the court requesting that her firearms be returned to her. CP 175-180, 181-187; RP (6/26/06) 3. At that time, defendant's attorney, Clifford Morey, agreed to the evaluation. RP (6/26/06) 4. The evaluation was not completed when, on July 25, 2006, a new attorney for the defendant, Gary Clower, substituted in, and the order for a competency evaluation was vacated. CP 195-196. Once Mr. Clower appeared as the defendant's attorney, he did not raise any concerns regarding the defendant's competency.

It is clear, based on his presentment of an order vacating the order for a competency evaluation, that Mr. Clower did not believe that such an evaluation was necessary. In determining whether a competency evaluation should be granted, the court should give considerable weight to the attorney's opinion regarding a client's competency. ***Seattle v. Gordon***,

39 Wn. App. 437, 442, 693 P.2d 741 (1985). It is clear by Mr. Clower's actions that he did not believe that his client was incompetent, and did not believe that such an evaluation was necessary. It is also implicit in the record that the defendant did not agree with her first attorney, Mr. Morey, who withdrew from the case. In this case, this court should give deference to Mr. Clower's assessment that a competency evaluation was not necessary. This was a case in which the State, presumably without ever having direct contact with the defendant, requested a competency evaluation based on several letters she wrote to the judge. Undoubtedly, Mr. Clower was in a better position to assess the defendant's mental status than was the State. Under these circumstances, this court should defer to Mr. Clower's order vacating the order for a competency evaluation, and deny the defendant relief.

The State acknowledges that ***State v. Marshall***, 144 Wn.2d 266, 27 P.3d 192 (2001), requires that the court hold a competency hearing whenever a legitimate question as to a defendant's competency arises. *Id.* at 279. As argued above, the concern of the defendant's competency was apparently not shared by the defendant's trial attorney, Mr. Clower. If, however, this court believes that, under ***Marshall***, a competency hearing was required, this court should remand for a competency hearing in the trial court below.

The defendant asserts that the correct remedy is reversal because to remand for a competency hearing at this time would be "impractical."

Supp. Brief of Appellant at page 9. The defendant relies on ***Pate v. Robinson***, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966), but ***Pate*** is distinguishable on its facts. In ***Pate***, the court determined that Robinson failed to receive an adequate hearing on his competence to stand trial. *Id.* at 386. The court declined to remand for a competency hearing, stating:

> It has been pressed upon us that it would be sufficient for the state court to hold a limited hearing as to Robinson's mental competency at the time he was tried in 1959. If he were found competent, the judgment against him would stand. But we have previously emphasized the difficultly of retrospectively determining an accused competence to stand trial. *Dusky v. United States*, 362 U.S. 402 (1960). The jury would not be able to observe the subject of their inquiry, and expert witnesses would have to testify solely from information contained in the printed record. That Robinson's hearing would be held six years after the fact aggravates these difficulties.

Id. at 387.

The present case is distinguishable from ***Pate*** in several respects. First, in the present case, it appears that Mr. Clower did not believe that a competency evaluation was necessary. Therefore, if this court were to remand for a competency hearing, Mr. Clower could provide testimony as to specifically why he presented an order vacating the order for a competency evaluation—information not available in ***Pate***. Second, the passage of time between the trial and the competency hearing would not be great. The trial in this case began in April of 2007. Therefore, the competency hearing could be held in under two years from the trial. It is likely that a determination can be made as to whether the defendant was

competent at the time of her trial. Finally, there is evidence available by which a competency determination could be made. In addition to testimony from Mr. Clower, the court would have the defendant's letters which were the basis for the original order. In this case, a competency hearing could be held on remand from this court, and it would be the proper remedy.

If this court is not inclined to remand this case for a competency hearing, it also could remand the case for additional evidence under RAP 9.11, which allows for this court to take additional evidence. RAP 9.11 provides:

> RAP 9.11 provides, in pertinent part:
>
> **(a)** **Remedy limited**. The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.
>
> **(b)** **Where taken**. The appellate court will ordinarily direct the trial court to take additional evidence and find the facts based on that evidence.

If this court were to take additional evidence on review under RAP 9.11, this court could have additional evidence regarding why the original competency order was vacated. Moreover, even if this court were to find that the six criteria of RAP 9.11 have not been satisfied, additional evidence may still be accepted to serve the ends of justice. RAP 1.2, RAP 18.8. *See also* ***State v. Elmore***, 139 Wn.2d 250, 302, 985 P.2d 289 (1999), ***Washington Fed'n of State Employees Council 28 v. State***, 99 Wn.2d 878, 884, 665 P.2d 1337 (1983).

It is possible that both parties would have new arguments to present based on a complete record as to why the order for a competency evaluation was vacated. Therefore, remand, either for a competency hearing to be held now, or for additional evidence to be taken on review, is the appropriate remedy.

2. DEFENDANT HAS FAILED TO MEET HER BURDEN OF SHOWING THAT THE PROSECUTOR COMMITTED MISCONDUCT IN ASKING ABOUT PLANT MATERIAL FOUND IN THE DEFENDANT'S JACKET.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. ***State v. Mak***, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); ***State v. Binkin***, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128

Wn.2d 1015 (1996), *overruled in part on other grounds by* ***State v. Kilgore***, 147 Wn.2d 288, 53 P.3d 974 (2002). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. ***Binkin***, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Id.*

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. ***State v. Manthie***, 39 Wn. App. 815, 820, 696 P.2d 33 (1985), *citing* ***State v. Weekly***, 41 Wn.2d 727, 252 P.2d 246 (1952).

In determining whether prosecutorial misconduct warrants the grant of a mistrial, the court must ask whether the remarks, when viewed against the background of all the evidence, so tainted the trial that there is a substantial likelihood the defendant did not receive a fair trial. ***State v. Russell***, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); ***State v. Weber***, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). In deciding whether a trial irregularity warrants a new trial, the court considers: (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could have been cured by an instruction. ***State v. Crane***, 116 Wn.2d 315, 332-33, 804 P.2d 10

(1991). The trial court is in the best position to assess the impact of irregularities. *See* ***State v. Mak***, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). The court will disturb the trial court's exercise of discretion only when no reasonable judge would have reached the same conclusion. ***State v. Hopson***, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

a. Relevant facts

i. First Statement

In a pretrial motion, the trial court precluded any mention of drugs or drug paraphernalia found in the defendant's residence. CP 29-30; RP (4/4/07) 94. At trial, the State called Patricia Eddings, a trace analyst, who analyzed evidence in the case. RP (4/19/07) 747, 754. During her testimony, Eddings described a red jacket that she examined, which was attributed to the defendant. RP (4/12/07) 376, (4/19/07) 757. She then indicated that there was "plant material" in a pocket of the sweatshirt. RP (4/19/07) 758. There was no objection to such testimony, nor was there a request for a sidebar by the defendant. Eddings went on to indicate that she did locate the "three component" on the sleeve area of the sweatshirt. RP (4/19/07) 760. She defined the "three component" as single particles that look like gunshot residue and have the elements barium, lead, and antimony in them. RP (4/19/07) 760. Eddings did not have any personal knowledge of where the particles came from, but did testify that there were a large number of particles on the jacket. RP (4/19/07) 783, 791.

ii. Second Statement

Eddings later testified regarding a "debris packet" containing animal hairs, plant material that was both burned and unburned, white metal fragments, yellow metal fragments, green polymeric material, dark foam material, and apparent dried blood. RP (4/19/07) 767. The "debris packet" came from the red sweatshirt. RP (4/19/07) 755. After Eddings testified regarding the packet, defense counsel asked for a sidebar. RP (4/19/07) 767. The court then excused the jury and defense counsel raised an objection. RP (4/19/07) 768. Defense counsel argued that it was "obvious" it was marijuana, and that everyone was shown a photograph of it. RP (4/19/07) 768-770. Defense counsel did not ask for a mistrial or for a curative instruction. Counsel stated:

> Just want to make sure there is no more of that. If there is anything else like that that's going to come up, I want to know about it now. And I think we should deal with this so I don't have to keep doing this in front of the jury.

RP (4/19/07) 774.

b. The defendant failed to timely object to the first statement.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. ***State v. Thetford***, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); ***State v. Hettich***, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993). With respect to the first statement by Eddings regarding the "plant material," defense counsel failed to object.

Therefore, the defendant is precluded from alleging error regarding that statement on appeal.

Assuming, arguendo, that an objection to either statement was properly preserved, reversal is not required because a curative instruction could have cured any error. If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. ***State v. Hoffman***, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). A curative instruction could have corrected any error. Such instruction was not requested.

When no curative instruction is requested, the defendant is required to demonstrate that the comment was so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by a curative instruction. In this case, the first matter the defendant now asserts was error was reference to "plant material" that was found in a sweatshirt worn by the defendant. Brief of Appellant at page 16-17. Defense counsel did not object to the initial statements regarding the "plant material." RP (4/19/07) 758-759. Because no curative instruction was requested, the defendant must show that the comment was so flagrant and ill-intentioned that it resulted in an enduring prejudice. The defendant cannot meet his burden.

First, the defendant mischaracterizes the testimony that was presented. The defendant asserts that the State committed misconduct when it deliberately "placed evidence of Grier's drug use in front of the

jury." Brief of Appellant at page 15. There was no evidence or testimony presented that the defendant *used* drugs. There was also no testimony that the defendant *possessed* drugs. There was only testimony that there was "plant material" in her sweatshirt. There was no testimony regarding any further details or description of the plant material. The defendant now asks this court to speculate as to what the "plant material" was, and to speculate as to what the jury believed it to be. The defendant cannot establish an enduring prejudice.

The "plant material" was not described by Eddings as being marijuana. The defendant can only speculate that the jury assumed Eddings was referencing marijuana. Second, when viewed in the light of the overwhelming evidence presented, the defendant cannot show that the prosecutor's questions were flagrant and ill-intentioned, and that any prejudice resulted from the statement.

c. Even if error occurred, the defendant cannot establish that any misconduct resulted in an enduring prejudice.

If the evidence was erroneously admitted, the question then is whether there is harmless error. ***State v. Jackson***, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Only if the outcome of the trial would have been different had the errors not occurred is the error deemed reversible error. *Id.* at 695.

> In making such a determination, the court obviously looks to the strength of the State's evidence. If the evidence is strong on each count then the results of the trial would not have been different if the error had not occurred. On the other hand, if the State's evidence is weak on each count then the outcome of the trial would be different.

State v. Bythrow, 114 Wn.2d 713, 722 fn. 4, 790 P.2d 154 (1990).

In this case, it appears that the defendant raised an objection to the second statement made, but did not make an objection to the first. In neither instance did the defendant request any kind of remedy. Even if the defendant properly objected to either statement, any error committed was harmless. As argued above, Eddings testified that the material was "plant material," not marijuana. There was no testimony presented that the material was tested, no testimony as to its quantity, and no testimony as to who owned the material. The defense in this case was self defense. CP 93-119 (instruction #15); RP (4/4/07) 99, (4/30/07) 971. There was testimony presented in this case that the defendant intentionally shot the victim. There was evidence presented that both the defendant and the victim had been drinking excessively.

The defendant cites to ***State v. Crane***, 116 Wn.2d 315, 804 P.2d 10 (1991), in support of her argument that prejudice occurred. In ***Crane***, there was testimony presented that Crane was engaged in methadone treatment. *Id.* at 332-333. The court held that any error that occurred did not warrant reversal. *Id.* at 333. The court stated:

> After reviewing the record as a whole, we find the trial court was correct in holding that the mention of methadone was so minute in the overall picture so as to create only a hint of prejudice. There is not a substantial likelihood this affected the jury verdict.

Id.

The defendant attempts to distinguish ***Crane*** by arguing that the witness in the case at bar referenced marijuana and then showed the jury a photograph of marijuana. Brief of Appellant at page 21. As argued above, Eddings did not state that the plant material was marijuana, and did not describe anything in the photograph as being marijuana. Similar to the court's analysis in ***Crane***, this court should find that, after reviewing the record as a whole, that Eddings' testimony and presentation did not affect the jury verdict. In ***Crane***, there was specific reference to Crane being in methadone treatment, suggesting that he was an addict. The court still found that reversal was not warranted. In the present case, there was no testimony that the defendant owned or used marijuana. In fact, testimony was presented that the defendant had not used marijuana. Dr. Fox testified that the urine drug screen for drugs that was preformed on the defendant was negative. RP (4/18/07) 12. There was testimony, however, that the victim had marijuana in his system. RP (4/17/07) 680. Given the non-specific nature of the testimony regarding the plant material, the overwhelming evidence presented, and the nature of the defendant's defense, any error that was committed by Edding's testimony did not

create a substantial likelihood that the jury's verdict was affected. The defendant's claim is therefore without merit.

3. THE TRIAL COURT PROPELRY EXERCISED ITS DISCRETION IN ADMITTING EVIDENCE, AND EVEN IF THE COURT ERRED IN FAILING TO CONDUCT A BALANCING TEST ON THE RECORD, IF THE COURT HAD DONE SO, IT WOULD HAVE STILL ADMITTED THE EVIDENCE.

The admission or exclusion of relevant evidence is within the discretion of the trial court. ***State v. Swan***, 114 Wn.2d 613, 658, 700 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991); ***State v. Rehak***, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *cert. denied*, 508 U.S. 953 (1993). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). Failure to object precludes raising the issue on appeal. ***Guloy***, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. ***State v. Castellanos***, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); ***Rehak***, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Such evidence is admissible unless, under ER 403,

the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

a. The trial court properly admitted evidence that the defendant threatened her son, Nathan, with a gun on the night of the murder, and if the court had conducted a balancing test on the record, it would still have admitted the evidence.

Washington courts have recognized, as a basis for the admission of other crimes evidence, criminal acts which are part of the whole deed. ***State v. Bockman***, 37 Wn. App. 474, 682 P.2d 925, *review denied*, 102 Wn.2d 1002 (1984)(*citing* ***State v. Jordan***, 79 Wn.2d 480, 487 P.2d 617 (1971). Under this "res gestae" or "same transaction" exception, evidence of other crimes is admissible to "complete the story of the crime on trial by proving its immediate context of happenings near in time and place." ***Bockman***, 37 Wn. App. at 490 (*citing* E. Clearly, McCormick on Evidence, §190 at 448 (2d ed. 1972).

In ***State v. Tharp***, 27 Wn. App. 198, 616 P.2d 693 (1980), *affirmed*, 96 Wn.2d 591 (1981), the defendant was charged with second degree murder. *Id.* at 200. The trial court admitted evidence of a series of uncharged crimes committed prior to and after the alleged murder. ***Tharp***, 96 Wn.2d 591 at 592. The Court of Appeals, Division One, held the admission was proper under the "res gestae" exception to ER 404(b).

Tharp, 27 Wn. App. 198 at 206. The court explained:

> The jury was entitled to know the whole story. The defendant may not insulate himself by committing a string of connected offenses and thereafter force the prosecution to present a truncated or fragmentary version of the transaction by arguing that evidence of other crimes is inadmissible because it only tends to show the defendant's bad character. "A party cannot, by multiplying his crimes, diminish the volume of competent testimony against him."

Tharp, 27 Wn. App. at 205. On appeal, the Supreme Court reaffirmed the "inseparable transaction" exception, stating:

> [T]he uncharged crimes were an unbroken sequence of incidents tied to Tharp, all of which were necessary to be placed before the jury in order that it have the entire story of what transpired on that particular evening. Each crime was a link in the chain leading up to the murder and the flight therefrom. Each offense was a piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury.

Tharp, 96 Wn.2d at 594.

In this case, the trial court properly admitted testimony that the defendant had pointed a gun at Nathan earlier in the evening on the night of the murder. RP (4/12/07) 444. The defendant also told Nathan that she could shoot him if she wanted to. *Id.* Courts have held that similar evidence is admissible and relevant.

In ***State v. Turner***, 29 Wn. App. 282, 627 P.2d 1324 (1981), where the defendant was convicted of three counts of second degree assault and one count of reckless endangerment arising out of a series of Halloween shooting incidents, the court held that the trial court properly admitted

evidence of prior rifle-pointing incidents to show the defendant's frame of mind. *Id.* at 283, 290. Turner was charged with having shot a firearm at passing vehicles, including a vehicle occupied by Kenneth Straight. *Id.* at 283-284. Testimony was introduced that, in a separate incident approximately five months earlier, Turner had pointed a gun at Straight and threatened to shoot him. *Id.* at 286. There was also testimony that approximately eight months before the shooting Turner asked an officer a hypothetical question regarding the use of firearm in defense of his property. *Id.* The court held that the trial court properly exercised its discretion in admitting testimony that Turner had previously pointed a firearm at Straight and had inquired about the use of a firearm in defense of his property. *Id.* at 289-290. The court held that, under the facts of the case, "the prior incidents were relevant and necessary to prove the essential ingredients of the offense." *Id.* at 290.

In ***State v. Thompson***, 47 Wn. App. 1, 733 P.2d 584, *review denied*, 108 Wn.2d 1014 (1987), the court recognized the res gestae exception. Thompson was charged with second degree murder and first degree assault while armed with a deadly weapon. *Id.* at 2. At trial, the court admitted the testimony of three witnesses, who described Thompson's behavior on the evening of the murder and assault. Thompson and his friends were at a tavern when a group of four people, two men—Dapping and Knoth— and two women, entered the bar. *Id.* One of Thompson's associates made a comment about the two women,

and then Thompson and his friends left on foot to a different tavern. *Id.* at 2-3. Thompson and his friends returned to the first tavern and got into a discussion with Dapping and Knoth about the comments made by Thompson's friend. *Id.* at 3. Thompson ultimately shot both Dapping and Knoth. *Id.* at 4.

Three witnesses were permitted to testify regarding Thompson's behavior on the evening of the incident. Coyne testified that he and his friend, Langton, were in Coyne's truck when then observed a fight in which one person was being attacked by three. *Id.* at 4. Langton rolled down the window of the truck and told the group that they should "make a fair fight out of it." *Id.* at 4. In response, one of the four people Coyne observed, the defendant, pointed a gun at Coyne's truck. *Id.* This incident occurred in the hour before the shooting. *Id.*

Another witness, Moore, described Thompson as brandishing a gun and yelling, "I'm going to kill the bastard." *Id.* at 4. The appellate court rejected the defendant's claim that the witnesses' testimony was irrelevant and unduly prejudicial. *Id.* at 10. The court found that the testimony was relevant under the res gestae exception because the conduct took place in the immediate time frame of the assault and murder. *Id.* at 12. The court further held:

> The State here correctly argues that the testimony of Langton, Coyne, and Moore is relevant because it tends to contradict Thompson's testimony that his acts of shooting

> were in self-defense, because it showed a continuing course of provocative conduct during the course of an evening.

Id. at 11.

The case at bar is similar to both ***Thompson*** and ***Tuner***. In the present case, the defendant pointed a gun at her son on the same evening that she shot at killed the victim. The court held that evidence that Thompson pointed his gun at Coyne and Langton was relevant to show "a continuing course of provocative conduct" and was relevant to contradict a claim of self defense. ***Thompson***, 47 Wn. App. 1 at 11. The evidence in the present case is almost identical to that admitted in ***Thompson***. Similar to ***Thompson***, the defendant was also engaged in continuing course of provocative conduct, making evidence that she pointed her gun at Nathan and threatened him relevant. Moreover, the defendant's claim at trial was that of self defense. Evidence that she had a gun and brandished it at another person in the same evening that she shot and killed another person is evidence that contradicts a self defense claim. Under ***Thompson***, evidence that the defendant pointed her gun at Nathan in the same evening that she killed the victim is relevant and probative. The trial court properly exercised its discretion in admitting such evidence.

The trial court should weigh the probative value of the evidence against its prejudicial effect prior to admitting the evidence under ER 404(b). ***State v. Lough***, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). However, "[a] failure to articulate the balance between probative value

and prejudice [in the ER 404(b) context] does not necessarily require reversal." ***State v. Carleton***, 82 Wn. App. 680, 686, 919 P.2d 128 (1996).

The court in ***Carleton*** stated that such error is harmless in two circumstances. First, the error is harmless "when the record is sufficient for the reviewing court to determine that the trial court, if it had considered the relative weight of probative value and prejudice, would still have admitted the evidence." ***Carleton***, 82 Wn. App. at 686 (citing ***State v. Gogolin***, 45 Wn. App. 640, 645-46, 727 P.2d 683 (1986)). Second, the error is also harmless "when, considering the untainted evidence, the appellate court concludes the result would have been the same even if the trial court had not admitted the evidence." ***Carleton***, 82 Wn. App. at 686-87 (*citing* ***State v. Jackson***, 102 Wn.2d 689, 696, 689 P.2d 76 (1984), and ***State v. Thamert***, 45 Wn. App. 143, 151-52, 723 P.2d 1204, *review denied*, 107 Wn.2d 1014 (1986)).

In this case, as argued above, the trial court properly exercised its discretion in admitting evidence that the defendant had pointed a gun at Nathan on the same evening as the murder. The State agrees that the trial court below did not conduct a balancing test on the record. However, reversal is not required for several reasons. First, the record is sufficient for this court to conclude that if the trial court had conducted a balancing test, it would have admitted the evidence. As argued above, evidence that the defendant pointed a gun at Nathan and threatened him in the same evening that she shot and killed the victim is evidence of a continuing

course of provocative conduct that is relevant. If the trial court had conducted such a balancing test, it would have undoubtedly concluded that the probative value outweighed the prejudice to the defendant. Second, there was overwhelming untainted evidence in this case, and therefore any error that may have occurred in the admission of such testimony would be harmless. Given all of the evidence that was presented in this case, the result below would have been the same if such testimony had not been presented.

b. The trial court properly admitted evidence that the defendant called Nathan and Cynthia Michaels unflattering names, which triggered a series of important events on the night of the murder, and if the court had conducted a balancing test on the record, it would still have admitted the evidence.

As argued above, Washington courts have recognized, as a basis for the admission of other crimes evidence, criminal acts which are part of the whole deed. ***State v. Bockman***, 37 Wn. App. 474, 682 P.2d 925, review denied, 102 Wn.2d 1002 (1984)(*citing* ***State v. Jordan***, 79 Wn.2d 480, 487 P.2d 617 (1971). In this case, the trial court admitted evidence that the defendant made unflattering comments to Nathan, which caused Nathan to make comments back to the defendant, which caused the victim to strike Nathan. The defendant argues, without reliance on any authority, that a sanitized version of events would have been sufficient to present to the jury. Brief of Appellant at page 33. Testimony was presented that the

defendant called Nathan a "little punk, a bitch, that he was a loser, that he was just a wimp and not a man." RP (4/11/07) 228. At the same time, the defendant was also making unflattering comments to Cynthia Michaels. RP (4/11/07) 226-227. The defendant called Michaels an "Asian whore" and told Michaels that she could not stand her. RP (4/11/07) 226. The comments made by the defendant caused Nathan to tell the defendant to "shut up," which caused the victim to slap Nathan in the mouth. RP (4/11/07) 141.

While the statements made by the defendant were unflattering, they triggered a series of events in which were necessary for the jury to hear in order to understand the events of the evening. As argued above, the defendant can cite to no authority that would require a sanitized version of events to be presented.

The defendant further asserts that the trial court erred in failing to conduct a balancing test on the record. The defendant's argument fails for several reasons. First, evidence that the defendant called Nathan names does not require a 404(b) analysis, as name calling is not evidence of a crime, wrong, or act that was admitted to show conformity. The defendant did not commit a crime by calling Nathan names. Similarly, the defendant did not commit a crime by calling Michaels a name, even if it was racial in nature. The defendant was not charged with a racial offense, and the comment was not used to argue conformity, but to establish a complete description of the events leading up to the murder. Second, even if this

court had conducted a balancing test on the record, it would have admitted the evidence, and therefore reversal is not required. Testimony was presented that everyone was intoxicated, and that there were multiple altercations during a short period of time, ultimately culminating in the defendant shooting the victim. Testimony regarding the nature of the altercations was relevant and admissible, and if a balancing test had been conducted, the court would have still admitted the testimony regarding the statements made by the defendant regarding both Nathan and Michaels.

4. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AND EVEN IF COUNSEL ERRED IN FAILING TO OBJECT, THE OUTCOME OF THE TRIAL WAS NOT AFFECTED.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution and in Article 1, Sec. 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* The court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S.

Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that "the essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect."

The test to determine when a defendant's conviction must be overturned for ineffective assistance of counsel was set forth in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and adopted by the Washington Supreme Court in ***State v. Jeffries***, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

> First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment.
>
> Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. See also ***State v. Walton***, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995); ***State v. Denison***, 78 Wn. App. 566, 897 P.2d 437, *review denied*, 128 Wn.2d 1006 (1995); ***State v. McFarland***, 127 Wn.2d 322, 899 P.2d 1251 (1995); ***State v. Foster***, 81

Wn. App. 508, 915 P.2d 567 (1996), *review denied*, 130 Wn.2d 100 (1996).

The Washington Supreme Court, in ***State v. Lord***, 117 Wn.2d 829, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56 (1992), gave further clarification to the intended application of the ***Strickland*** test. The ***Lord*** court held the following:

> There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

Strickland, at 689-90.

Under the prejudice aspect, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, at 694. Because [the defendant] must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel's performance was deficient. ***Strickland***, at 697, ***Lord***, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. ***McFarland***, 127 Wn.2d at 335 (*citing* ***State v. White***, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case,

viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). Defendant has the "heavy burden" of showing that counsel's performance was deficient in light of all surrounding circumstances. ***State v. Hayes***, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689.

a. Evidence was not presented that the defendant was a "bad mother," and all evidence that was presented regarding the defendant's relationship with Nathan was relevant and admissible; the defendant cannot establish that he received ineffective assistance of counsel.

Testimony was presented that the defendant withheld money from Nathan until Nathan gave the defendant the clip to her gun. RP (4/11/07) 135, 217-218. The defendant did not object to this evidence. A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. ***State v. Thetford***, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); ***State v. Hettich***, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993). Therefore, the defendant has waived any objection to the evidence that was presented.

The defendant alleges that trial counsel was ineffective in failing to object. Brief of Appellant at page 35. It is clear, however, that any

objection to this evidence would have been overruled. Evidence that the defendant was demanding a clip for her gun in the same evening where she shot and killed someone is highly relevant evidence. It establishes that she was attempting to arm herself with a functional gun, which she ultimately did. The defendant has not presented any argument as to how such evidence would not be relevant and admissible, except as to assert that it portrayed the defendant as a "bad mother" that she was withholding Nathan's social security money in exchange for a gun clip. The events regarding the clip, however, are inextricably linked to the murder that occurred shortly thereafter. It was clearly part of the events that lead up to the murder, and was direct evidence that the defendant had the means of committing the murder. Any prejudice that resulted in the testimony was far outweighed by the probative nature of the evidence. Therefore, any objection raised by trial counsel would have been overruled, and trial counsel was not deficient for failing to object. Moreover, even if the evidence was admitted in error, the defendant cannot establish that the outcome of the trial would have been different, and therefore she cannot establish prejudice.

The defendant also alleges that testimony regarding where Nathan was living in the months and days before the murder was admitted in error. Brief of Appellant at page 35-36. Nathan testified that he was living in foster care for a few months before this incident, but that at the time of the shooting he was living with the defendant. RP (4/11/07) 124.

Nathan did not testify about why he was in foster care, or any details surrounding it. RP (4/11/07) 124.

The defendant also asserts that "Grier did not want Nathan at the house because Nathan did not like her boyfriend." Brief of Appellant at page 35. Such assertion, however, mischaracterizes the testimony. Nathan testified as follows:

> We were just talking, and my mom didn't want me at the house really that much because I didn't like her boyfriend and stuff, like, we had problems kind of. We didn't like each other.

RP (4/11/07) 140.

Nathan did not testify, as the defendant now appears to suggest, that the defendant refused to allow Nathan to stay at her home and that was the reason that Nathan was in foster care. There was no testimony as to why Nathan was in foster care, nor was there any testimony that the defendant had refused to allow Nathan to stay at her house. The testimony certainly did not portray the defendant as a bad mother. Nathan's living arrangements were not attributed to the defendant except insofar as the defendant had indicated that she did not want him at the house "that much." There is nothing prejudicial about the testimony that was presented. The testimony was, however, relevant to show Nathan's knowledge of the residence and the location of the defendant's weapons. Defense counsel was not ineffective for failing to object, because any objection would have been overruled. Moreover, the defendant cannot

establish any prejudice from this testimony. The testimony was benign in nature. The State did not argue that the defendant caused Nathan to live in foster care, nor was there any evidence to support such argument. The State also did not argue that Nathan's living arrangements made her a bad mother. Based on all of the testimony presented, it is clear that the outcome of the trial was not affected by this testimony.

b. The defendant cannot establish ineffective assistance of counsel for failing to object to evidence that the defendant previously fired her guns.

The State introduced testimony that the weekend before the murder, the defendant had the victim, Starr, and their child to her home for dinner. RP (4/11/07) 212-213. At that time, Starr observed guns in the defendant's waistband. RP (4/11/07) 213. The defendant had indicated that she was using the guns for protection. *Id.* The victim made a joking comment about the defendant carrying the guns in her waistband, asking her if she thought they were "big and bad," and the defendant indicated yes. RP (4/11/07) 214. Trial counsel made an objection when the State asked Starr if she did anything else with the gun at the dinner party. RP (4/11/07) 213-214. The defense objection was that it was irrelevant what was going on a week before the shooting. RP (4/11/07) 214. Defense counsel did not make an objection regarding ER 404(b).

In this case, the defendant raised an objection as to relevance only with respect to anything the defendant did with the guns at the dinner party. The defendant did not object to the testimony that the defendant possessed the guns at the dinner party. A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. ***Guloy***, 104 Wn.2d at 421.

In order to establish that defense counsel was deficient for failing to object under ER 404(b), this court would have to find, as argued above, that the outcome of the trial would have been different if a 404(b) objection had been made. The defendant cannot make such a showing. The defendant claimed, in part, the defense of self defense. CP 93-119 (instruction #15); RP (4/30/07) 971. In so doing, evidence that she possessed a gun prior to the shooting is marginally relevant and not prejudicial. Moreover, multiple witnesses observed the defendant with guns on the night of the murder. RP (4/11/07) 219, 146, (4/12/07) 444. Evidence that the defendant possessed firearms a week before the shooting is relevant to show that she owned or had access to firearms. It was also relevant to show that she was armed with the firearms. The defendant cannot establish that the outcome of the trial would have been different if a specific and timely objection had been made.

The defendant also asserts that trial counsel was ineffective for failing to object to testimony that the defendant had fired her gun into her driveway on an earlier occasion. Brief of Appellant at page 40. Again, there was no objection to this testimony, so an objection is deemed to be waived. When examining an ineffective assistance of counsel claim, however, the defendant cannot establish the outcome of the trial would have been different, or that an objection would have even been sustained. Testimony was presented that the defendant went to a shooting range occasionally. RP (4/11/07) 136. Nathan also testified as follows:

> One time I shot it. We were driving around, and we parked. It was, like, outside the house one time. And these people were, like, coming in our driveway, and they would rev their engines, like, three times a night, and they would drive away. And they would leave their lights off until we would come outside, and then they would turn them on and, like, take off.
>
> And she was kind of scared one night, and she wanted me to, like, call the cops because they were people that didn't live in our neighborhood that came by every night. And then we just went out in the front, like on the step, and shot it up in the air to scare them, and they took off.

RP (4/11/07) 136-137.

Nathan testified that on that occasion the defendant shot the first shot into the grass, and Nathan fired the second shot. RP (4/11/07) 137. Again, defense counsel did not object to this testimony. Any objection to this testimony is therefore waived. Therefore, the defendant has the burden of establishing that the outcome of the trial would likely have been

affected by the evidence, when the trial is examined as a whole. The defendant cannot meet his burden. The defendant asserts that such evidence was prejudicial under ER 403 and 404(b). However, because there was no objection below, the defendant is precluded from raising it on appeal.

To the extent the defendant is raising an ineffective assistance of counsel claim to this issue, the testimony that the defendant previously shot the gun was relevant for several reasons, and therefore an objection to such testimony would have been overruled. First, after the victim shot the defendant's gun at a house across the street immediately before the murder, the defendant emerged from her room asserting that she had heard the sound of her gun, and that she knew what her gun sounded like. RP (4/11/07) 153. Evidence that the defendant had previously fired her guns and was familiar with the sound was relevant. Second, because there was testimony that the victim had shot the gun in the driveway, it is relevant that the defendant and Nathan had also shot a gun in the driveway to explain everyone's reaction to the event. Evidence that the defendant fired her gun on prior occasions was relevant, and even if this court finds that it was not relevant, the defendant cannot establish that the outcome of the trial would have been different, given the evidence presented.

c. The defendant cannot establish ineffective assistance of counsel for failing to object to evidence regarding the defendant's statements on the day of the murder about why she was armed with guns.

On the evening of the murder, Starr and the defendant went to a liquor store. RP (4/11/07) 218. Before leaving, Starr asked the defendant to leave her guns at home. RP (4/11/07) 219. Before the defendant went into the store, Starr saw guns in the defendant's purse, and the defendant told her that she thought there were people in her attic. RP (4/11/07) 219. The defendant went on to state that her ex-boyfriend had sent someone to rape her and that she had to confront the man with a gun, and that is how she came to have two guns. RP (4/11/07) 220-221.

Again, defendant did not raise an objection to such testimony below, and it is therefore waived on appeal. The defendant must show, under an ineffective assistance of counsel claim, that the outcome of the trial would likely have been affected by the testimony. The defendant cannot meet her burden. First, evidence that the defendant armed herself against men she believed were trying to attack her is relevant to show that she was carrying firearms on the night of the murder and had easy access to them.

More importantly, defense counsel had a legitimate trial strategy for not objecting to such testimony. If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve

as a basis for a claim that defendant did not receive effective assistance of counsel. ***State v. Lord***, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. ***State v. McFarland***, 127 Wn.2d 322, 336, 899 P.2d 125 (1995). In closing argument, defense counsel, in a clear attempt to discredit Starr, argued that her testimony was exaggerated. RP (4/30/07) 956. Counsel's closing argument addressed, in essence, that Starr was not credible. RP (4/30/07) 954-956. Therefore, it could have been a legitimate trial strategy by defense counsel not to object to Starr's testimony about the defendant's behavior and attack Starr's credibility later.

Finally, even if this court finds that it was not legitimate strategy to not object to the testimony, the defendant still cannot show that the outcome of the trial would have been different. All of the witnesses who were present at the time of the murder testified that, at some point in the time immediately before the shooting, the defendant had a gun. RP (4/11/07) 160, 244-245, (4/12/07) 453. Therefore, evidence that the defendant may have armed herself earlier against a perceived threat would not have changed the outcome of the case, and the defendant is not entitled to relief.

d. The defendant cannot establish ineffective assistance of counsel for failing to object to vague testimony regarding the defendant's employment.

Two witnesses for the State—Starr and Officer Vahle—both testified regarding the defendant's employment. Starr testified that she did not believe the defendant was working at the time of the shooting. Officer Vahle, who spoke with the defendant at the hospital, testified that the defendant indicated she worked as a waitress, but that she was not currently working. RP (4/12/07) 378. Defendant's assertion that both statements caused her prejudice are without merit.

First, neither statement made was explicit that the defendant was unemployed. The fact that the defendant was not currently working or not working at the time of the shooting could mean any number of things, including that she had the day off from a job. Neither witness stated that the defendant did not have a job. Therefore, the defendant's assertion that testimony regarding the defendant's "jobless status" was error is without merit.

Second, the defendant did not object to such testimony below. As argued above, the defendant must therefore demonstrate that the outcome of the trial would have been different had an objection been timely made. In this case, the outcome clearly would not have been different. Both references to the defendant's employment were vague. Even if the jury was to somehow infer that the defendant was unemployed, the testimony

was not highlighted by either party, and was not argued in closing argument. Against the backdrop of the entire case, in light of all of the evidence presented, the defendant cannot establish any kind of prejudice.

The defendant relies on ***State v. Kennard***, 101 Wn. App. 533, 6 P.3d 38 (2000), for the proposition that "Drawing attention to a defendant's unemployment raises the danger that the jury will impermissibly infer that the defendant committed a crime because poor people commit crimes." Brief of Appellant at page 43. ***Kennard*** is distinguishable in several ways. In ***Kennard***, he was convicted of robbery in the first degree and two counts of robbery in the second degree for robbing banks. ***Kennard***, 101 Wn. App. 533 at 535. The trial court admitted testimony regarding Kennard's bankruptcy proceedings. *Id.* The court held that the trial court properly exercised its discretion in admitting such evidence because it was relevant to show the defendant was living beyond his means. *Id.* at 540. The court, citing ***State v. Matthews***, 75 Wn. App. 278, 286-87, 877 P.2d 252 (1994), stated that evidence of a poor financial condition may be highly prejudicial standing alone because of the inference that poverty leads to crime. ***Kennard***, 101 Wn. App. 533 at 541. ***Kennard*** is not applicable to the present case because in the present case no testimony was presented regarding the defendant's financial status. Moreover, it appears that the issue of Kennard's financial status was raised during his trial below, unlike in the present case.

Here, the defendant simply cannot show that these two vague references to the defendant's employment affected the outcome of the trial. Without making such a showing the defendant cannot establish that her counsel was ineffective for failing to raise such an objection.

e. The trial court properly exercised its discretion in admitting evidence at trial, a limiting instruction was unnecessary, and even if trial counsel erred in failing to request a limiting instruction, the defendant cannot establish prejudice.

Defendant claims on appeal that evidence was improperly admitted under ER 404(b) with respect to the defendant withholding Nathan's money, Nathan living in foster care, the defendant displaying a gun a week before the murder, the defendant previously firing her gun, the defendant's belief that people were in her attic and being sent to rape her, and the fact that she was not working at the time of the murder. Supplemental Brief of Appellant at page 10-11. Below, the only objection that was made was to relevance with respect to the defendant displaying her weapons to the victim a week before the murder. RP (4/11/07) 214. Thus, the defendant has failed to preserve an objection under ER 404(b).

ER 105 provides that "when evidence which is admissible as . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." (Emphasis added). Generally

this instruction is given when evidence is admitted under ER 404(b). *See* ***State v. Myers***, 82 Wn. App. 435, 439, 918 P.2d 183 (1996), *affirmed*, 133 Wn.2d 26, 941 P.2d 1102 (1997). First, there was no limiting instruction requested for any of the evidence listed above. Again, this issue is not preserved. Assuming there was any error in failing to give a limiting instruction, such error was harmless give the overwhelming evidence presented and the lack of prejudice caused by the admission of the evidence.

Defense counsel's failure to request limiting instructions can be classified as legitimate trial strategy and therefore cannot be the basis for an ineffective assistance of counsel claim. If counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim of ineffective assistance. ***State v. Day***, 51 Wn. App. 544, 553, 754 P.2d 1021 (1988)(*citing* ***State v. Mak***, 105 Wn.2d 692, 731, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986)). As for the second prong, a reasonable probability of a different outcome is a probability sufficient to undermine confidence in the outcome of the original proceeding. ***State v. Gonzalez***, 51 Wn. App. 242, 247, 752 P.2d 939 (1988) (*citing* ***State v. Sardinia***, 42 Wn. App. 533, 539, 713 P.2d 122, *review denied*, 105 Wn.2d 1013 (1986)).

Defendant contends that counsel was ineffective when he failed to request limiting instructions. Assuming, *arguendo,* that this evidence

warranted a limiting instruction, failure to request such an instruction was within the bounds of sound trial strategy. Often, to request and give a limiting instruction only highlights the prejudicial nature of such evidence and draws the jury's attention to it. Defendant has failed to meet her burden of showing ineffective assistance of counsel in this area as well.

Even assuming counsel erred, the error does not require reversal. Reversal is not required where an error in the admission of 404(b) evidence does not result in prejudice to defendant. ***State v. Thomas***, 150 Wn.2d 821, 83 P.3d 970 (2003). An error in the admission of 404(b) evidence is nonconstitutional in nature. ***State v. White***, 43 Wn. App. 580, 587, 718 P.2d 841 (1986). Where the error is nonconstitutional, the error is "not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." ***State v. Tharp***, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). "The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." ***State v. Bourgeois***, 133 Wn.2d 389, 4, 945 P.2d 1120 (1997).

Where alleging ineffective assistance, defendant must also show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Defendant has failed to meet her burden of showing that but for the ineffective assistance, there is a reasonable probability that the outcome would have been different. *Id.*

at 94. None of counsel's alleged errors would have affected the outcome of the trial given the overwhelming evidence of guilt in this case.

5. THE DEFENDANT IS NOT ENTITLED TO RELIEF UNDER THE DOCTRINE OF CUMULATIVE ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." ***Rose v. Clark***, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." ***Neder v. United States***, 527 U.S. 1, 17, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). "[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." ***Brown v. United States***, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973)(internal quotation omitted).

Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. ***Rose***, 478 U.S. at 577. Thus, the harmless error doctrine allows the court

to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also* ***State v. Kitchen***, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)("The harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.").

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. ***In re Lord***, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); ***State v. Coe***, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *see also* ***State v. Johnson***, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) ("although none of the errors discussed above alone mandate reversal...."). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing those errors. ***State v. Russell***, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

There are two dichotomies of harmless errors that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test and therefore they will weigh more on the scale when accumulated. *Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *Id.* Second, there are errors that are harmless because of the strength of the untainted evidence

and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See e.g.*, ***State v. Johnson***, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See e.g.*, ***State v. Stevens***, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990)("Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.").

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare, ***State v. Whalon***, 1 Wn. App. 785, 804, 464 P.2d 730 (1970), *review denied*, 78 Wn.2d 992 (1970)(holding that three errors amounted to cumulative error and required reversal), with ***State v. Wall***, 52 Wn. App. 665, 679, 763 P.2d 462 (1988), *review denied*, 112 Wn.2d 1008 (1989)(holding that three errors did not amount to cumulative error), and ***State v. Kinard***, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979), *review denied*, 92 Wn.2d 1002 (1979)(holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see e.g.*, ***State v. Badda***, 63 Wn.2d 176, 385 P.2d 859 (1963)(holding that failure to instruct the jury (1) not to use

codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see e.g.*, ***State v. Coe***, 101 Wn.2d 772, 684 P.2d 668 (1984)(holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); ***State v. Alexander***, 64 Wn. App. 147, 822 P.2d 1250 (1992)(holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see e.g.*, ***State v. Torres***, 16 Wn. App. 254, 554 P.2d 1069 (1976)(holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See* ***State v. Stevens***, 58 Wn. App. 478, 498, 794 P.2d 38 (1990). As argued above, the issues raised by the defendant were not error and assuming arguendo that they were, they were not prejudicial to the defendant and do not amount to cumulative error.

6. THIS COURT SHOULD REMAND TO THE SENTENCING COURT TO DETERMINE IF BOTH RCW 9.94A.700(5)(c) AND RCW 9.94A.505(9) ARE SATISFIED.

When a court orders mental health treatment and counseling, the court must satisfy two separate statutes—RCW 9.94A.700(5)(c), and RCW 9.94A.505(9). First, pursuant to RCW 9.94A.700(5)(c), the condition must be crime-related. ***State v. Jones***, 118 Wn. App. 199, 208-209, 76 P.3d 258 (2003). Second, the court must comply with RCW 9.94A.505(9), which requires that the court make a finding that reasonable grounds exist to believe the defendant is mentally ill, and that the mental illness likely influenced the offense. *Id.*

a. The trial court has the authority to impose a mental health examination with a psychosexual component because the condition is crime related and therefore satisfies RCW 9.94A.700(5)(c).

The imposition of crime-related prohibitions is generally reviewed for abuse of discretion. ***State v. Armendariz***, 160 Wn.2d 106, 110, 156 P.3d 201, 203 (2007)(*citing* ***State v. Ancira***, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001)). Where a case hinges on a matter of statutory interpretation, however, de novo is the appropriate standard of review. ***Armendariz***, 160 Wn. 2d at 110 (*citing* ***State v. J.P.***, 149 Wn.2d 444, 449, 69 P.3d 318 (2003)). Here, the key question is whether there was sufficient evidence to support the court's imposition of a mental health

evaluation and treatment; thus, review is for abuse of discretion. Abuse of discretion occurs when the decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. ***State v. Hays***, 55 Wn. App. 13, 16, 776 P.2d 718 (1989). A condition is crime related if it directly relates to the circumstances of the crime. RCW 9.94A.030(13).

RCW 9.94A.700(5) states:

> (5) As part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:
>
> (a) The offender shall remain within, or outside of, a specified geographical boundary;
>
> (b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;
>
> (c) The offender shall participate in crime related treatment or counseling services;
>
> (d) The offender shall not consume alcohol; or
>
> (e) The offender shall comply with any crime-related prohibitions.

In this case, the court imposed, as a condition of the defendant's sentence that the defendant undergo a mental evaluation and treatment recommended. CP 136-146. The trial court has the authority to impose such a sentence because it is related to the circumstances of the defendant's crimes. Factually, the case involved an unprovoked shooting of the victim. Earlier in the evening, the defendant asserted that she

thought people were in her attic and that her ex-boyfriend had sent someone to rape her. RP (4/11/07) 219-221. Testimony was also presented that, on the night of the murder, the defendant exhibited unusual behavior that involved mood swings such as crying and being angry to being flirtatious with the victim. RP (4/11/07) 133-134, 141-143, 145, 162, 183, 223, 227-228, 234, (4/12/07) 424, 444, 471. There was also testimony that the defendant may have been suicidal or talked about suicide. RP (4/11/07) 145, (4/12/07) 444. A mental health evaluation and treatment, under the facts of the defendant's case, are related to the underlying facts of the crime, and therefore the trial court had the authority to impose such a condition.

As argued below, the State agrees that remand for a hearing would be appropriate in this case. At such hearing, the trial court could articulate its basis for imposing such a condition, based on facts that are agreed to, admitted, acknowledged, or proven at sentencing pursuant to RCW 9.94A.530(2), and make a finding as to whether the defendant's mental illness contributed to the crimes the defendant committed. If the court makes such a finding, similar to the findings made in ***State v. Powell***, 139 Wn. App. 808, 162 P.3d 1189 (2007) and ***State v. Motter***, 139 Wn. App. 797, 162 P.3d 1190 (2007), then the condition of a mental health evaluation and follow up treatment would be appropriate.

b. The State concedes that this court should remand for the sentencing court to determine if RCW 9.94A.505(9) is satisfied.

In ***State v. Jones***, 118 Wn. App. 199, 76 P.3d 258 (2003), the defendant was convicted of first degree burglary and other crimes. *Id.* at 202. As a condition of the defendant's sentence, the court ordered mental health treatment. *Id.* at 203. The defendant appealed, alleging that the trial court did not have the authority to order the defendant to participate in mental health treatment and counseling. *Id.* at 208. The court held that the trial court must satisfy both RCW 9.94A.700(5)(c) and RCW 9.94A.505(9) in order to impose such a condition. *Id.* at 208-209.

RCW 9.94A.505(9) states:

> The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

The court in ***Jones***, *supra*, held that because the court did not make a finding that the defendant was a person whose mental illness had contributed to his crimes, that the condition was not properly imposed.

Jones, 118 Wn. App. 199 at 209. The court then stated that the mental health treatment condition should be stricken unless the court complied with RCW 9.94A.505(9). *Id.* at 212.

The State concedes that RCW 9.94A.505(9) was not satisfied. Therefore, the proper remedy would be to remand to the trial court to conduct a hearing to determine if the mental health evaluation is appropriate in light of RCW 9.94A.505(9). If, on remand, the trial court cannot find that the defendant had a mental illness that contributed to his crimes, the condition should be removed from his judgment and sentence. Pursuant to RCW 9.94A.505(9), a presentence report would also be required[3]. If, however, the court does make a finding, based on the presentence report, that the defendant's mental illness contributed to the offense, then the condition should remain as properly imposed. If the trial court relies on facts not admitted, acknowledged or proven at the time of sentencing, it should conduct an evidentiary hearing pursuant to RCW 9.94A.530. *See* ***State v. Crockett***, 118 Wn. App. 853, 78 P.3d 658 (2003) (evidentiary hearing required when the court ordered a psychosexual evaluation after defendant entered a plea).

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[3] It does not appear from the record that a presentence report was ever requested.

7. THIS COURT SHOULD REMAND FOR THE SENTENCING COURT TO DETERMINE IF RCW 9.94.607(1) IS SATISFIED BEFORE IMPOSING THE CONDITION OF A CHEMICAL DEPENDENCY EVALUATION AND TREATMENT.

RCW 9.94.607(1) states:

> Where the court finds that the offender has a chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.

The State concedes that the court did not make a specific finding that chemical dependency contributed to the defendant's crime. However, the sentencing court certainly had the authority to order such a condition if the requisite finding was made. Factually, evidence was presented at trial to support such a finding. Outside the presence of the jury, defendant's attorney acknowledged that the plant material in the defendant's jacket was marijuana, and that the analyst's notes refer to the material as marijuana. RP (4/19/07) 768. Therefore, as argued above, this court should remand for the sentencing court to make a determination as to whether the defendant's chemical dependency contributed to her offense.

If the sentencing court declines to make such a finding, the condition should be stricken.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that this court remand for a competency hearing and for clarification as to the court's conditions of community custody, and that this court deny the defendant relief on all of the other claims raised.

DATED: JUNE 2, 2008

GERALD A. HORNE
Pierce County
Prosecuting Attorney

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WSB # 32724

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/2/08 Johnson
Date Signature